RECENT CASES.

DURESS — WHO CAN AVOID. — In an action against a surety on a bail bond duress of the principal cannot be taken advantage of as a ground of defence, no unlawful restraint having been imposed on the surety. *Oak* v. *Dustin*, 7 Atl. Rep. (Me.) 815.

MESNE PROFITS — REAL ACTION. — Where a plaintiff brought suit in ejectment, and asked for mesne profits during defendant's possession, and recovered in the ejectment suit, it was held that the recovery of the profits was based on an implied contract, and not upon the trespass or oisseisin, and was, therefore, barred, because the statutory limit as to the former class of actions had expired, though the limit as to the latter class had not. *Seibert* v. *Baxter*, 12 Pac. Rep. (Kan.) 934.

FIDUCIARY RELATION. — It is held in *Dunn* v. *Dunn*, 7 Atl. Rep. (N. J.) 842, that where an attorney buys from a client a mortgage of which the attorney has had charge, he stands in a fiduciary relation, and must "show affirmatively that the transaction was conducted in perfect good faith, without pressure of influence on his part, with complete knowledge of the situation and circumstances and entire freedom of action on the part of the seller;" and unless this is shown the client may have a reassignment.

RESULTING TRUST TO PAYOR OF CONSIDERATION. — Where a tenant by curtesy and the heirs of his deceased wife agree that, in order to raise money upon the land, partition proceedings shall be instituted, and that one of the heirs shall buy in the property at the sale, and shall then execute a mortgage of the property, and this is done, receipts from the heirs and the tenants being accepted by the master who made the sale as cash in full payment of the price, a resulting trust arises as to the equity of redemption in favor of the tenant by curtesy and the remaining heirs. *Donlin* v. *Bradley*, 10 N.-East Rep. (Ill.) 11. This case is in line with the general principles of resulting trusts (Ames Cas. on Trusts, I. 292), the only peculiarity being the method in which the consideration was advanced by the heirs.

CONDITIONAL SALE — SUBSEQUENT PURCHASER. — In *Redewill* v. *Gillen*, 12 Pac. Rep. (N. M.) 872, it was held, in an exhaustive opinion, that when an article is sold on condition that it remains the vendor's property until all the instalments of the price are paid, a purchaser from the vendee, even without notice, can acquire no title whatever. In New York, *Wait* v. *Green*, deciding in favor of an innocent purchaser, has been virtually overruled by *Ballard* v. *Burgett;* but the later case of *Comer* v. *Cunningham* (77 N. Y. 391) seems to have undermined seriously *Ballard* v. *Burgett.* Illinois and Kentucky are ranged with *Wait* v. *Green;* but elsewhere, including the U. S. Supreme Court, the weight of authority is to the contrary, and, in deference to it, the court in *Redewill* v. *Gillen* decided, against their sense of justice, in favor of the plaintiff.

INJUNCTION — ENFORCING CONTRACT OF EXCLUSIVE SERVICE. — In *Peperno* v. *Harmiston* (31 Sol. Journ. 154), where the defendant, who was under an agreement to supply certain horses and performers to a circus, threatened to remove his stock, the court refused an injunction to restrain the removal, on the ground that where specific performance cannot be given, an injunction will not be granted unless damages are an inadequate compensation. This they stated to be the principle of *Lumley* v. *Wagner*, the leading case (1 *DeG., McN., & G.* 604). But the decision in that case (by Lord St. Leonards) makes no such distinction, nor does the Vice-Chancellor in the hearing below (5 *DeG. & Sm.* 485). It is true that the principle is so stated in a leading New York case, *Daly* v. *Smith* (49 *How. Pr.* 150), but not in a well-considered decision by Lowell, J., in 1 *Holmes*, 253, nor in the majority of cases (20 *Am. L. Reg., N. S.* 587).

SALE — ORDERS OF AGENT. — Under a statute imposing a fine on any person who, without a license therefor, shall, by sample or procuring orders or otherwise, sell intoxicating liquors, a commercial traveller for a firm in another State, who merely takes an order from a dealer in Connecticut and forwards it to his firm, who deliver it in their State, is guilty of an offence. *State* v. *Ascher*, 7 Atl. Rep. (Conn.) 822. The ground of the opinion is that "while delivery for all civil purposes completes the sale made by the drummer, vests the title in the purchaser, and gives the seller a right to the purchase money; yet, for all police purposes, it is competent for the Legislature to say that the acts done by the drummer shall of themselves constitute a sale, and therefore an offence." A minority of two judges, dissenting, held that the drummer's order was not even an executory contract, but merely an offer.

SURETY — DEBT OF ANOTHER. — McM. had in his possession funds of uncertain amount belonging to B, and promised M to pay, to the extent of his liability to B, a debt of B to M. The promise was made by accepting verbally an order of B directing McM. to pay M out of the funds in McM.'s hands. It was held that the promise of McM. was not to pay the debt of another, but to pay to M his own debt to B, and therefore not within the Statute of Frauds. *Mitts* v. *McMorran*, 31 N. W. Rep. (Mich.) 521. The conclusion seems correct, but not the statement that it was a promise to pay his own debt; for (*a*) a debt must be in a certain amount (Y. B. 12 E. 4, 9, pl. 22; 3 Leon. 161; 30 Alb. L. J. 223); (*b*) the funds which McM. held were the subject of a bill of account, and not of an action of debt; it was simply a fund in the hands of McM. belonging to B, and therefore could not be a debt.

STATUTE OF LIMITATIONS — TITLES. — In *Chapin* v. *Freeland* (142 Mass. 383) the facts were substantially as follows: A was owner of some counters; B converted them to his own use, and kept them for six years; they were then sold to C, from whom A, the original owner, peaceably retook them. C brings replevin against A. Held, C can recover, because A's right of action against B, and also against C, was barred by the statute, and A cannot put himself in a better position by retaking the goods than he would be in if he had brought an action. *Field, J.*, dissents. The Massachusetts Statute of Limitations bars the remedy, but does not transfer title, and inasmuch as A's title to the goods remained unimpaired, and as he obtained them back peaceably, there is no reason why he should not keep them. Cf. Langdell on Equity Pleading, § 111 *et seq.*

It is difficult to escape the reasoning of *Field, J.* Moreover, at common law A might have brought detinue, for the Statute of Limitations does not run against the action of detinue till six years after a demand made by the original owner. This would seem to be an additional reason why A should be allowed to keep his goods.

QUASI CONTRACT — ACCIDENTAL BENEFIT. — The Pacific R. R. Co. sued the U. S. for services done in the way of transportation of passengers and freight, for which the U. S. are indebted to it in the sum of $136,196.38. The U. S. pleads, as a set-off, the cost of certain bridges built by the U. S. for and at the request of the Company. The question is whether the set-off shall be allowed. In evidence it appeared that during the civil war some of the bridges of the Company were destroyed, partly by the Confederate, and partly by the Union armies. Some of these were rebuilt by the Company, but the bridges in question were constructed by the U. S., to enable them to carry on military operations.

The court held, that under these circumstances, as there was no contract, express or implied, to build these bridges, and as they were constructed only as a military necessity, the U. S. could not charge the Company for them. In an interesting opinion, Field, J., discusses how far the government is liable for property destroyed during the war, and how far the principle applies that private property shall not be taken for public use without compensation.

The point in implied contracts is a nice one. The case is instructive to show that benefit is not the basis of recovery where it is purely accidental, and where the enriching party intended only to benefit himself. *U. S.* v. *Pacific R. R. Co.*, 7 Supr. Ct. Rep. 490.

CONTRACT IMPLIED IN FACT — LIABILITY OF SLEEPING CAR COMPANIES FOR THEFTS FROM PASSENGERS. — In *Lewis* v. *N. Y. Sleeping Car Co.* (Supreme Court of Massachusetts, Jan. 7, 1887, reported in *Chicago Legal News* of Feb. 12; S. C., *Massachusetts Law Reporter*, Feb. 10), 143 Mass. 267, the court held that the company was liable to a passenger for money stolen from under his pillow while asleep, in the absence of proper care for his protection by the company's officers, and that the fast that two larcenies were committed in that manner was some evidence of such negligence on the part of the company as would render it liable. The action was both in contract and tort. The court considered that the ticket received by the passenger did not express all the terms of the contract entered into. "The contract thereby entered into is implied from the nature and usages of the employment of the company." Knowing that during the night the passenger will be powerless to guard his property, the company invites its passengers to make use of the cars for sleeping. By selling a ticket the company impliedly stipulates to furnish safe and comfortable cars. As to the count in tort, the court say, "The law raises the duty on the part of the car company to afford him this protection" on grounds of public policy.

This case is to be compared with *Whitney* v. *Pullman's Palace Car Co.*, in the same number of the *Chicago Legal News*, S. C., 143 Mass. 243. The loss in the latter case occurred in the daytime, and the passenger was guilty of contributory negligence. *Held*, that the company was not liable.

The authorities cited in these cases agree that a sleeping car company is not liable either as an inn-keeper or as a common carrier. The courts seem inclined to apply reasons of public policy similar to those which prevailed in case of inn-keepers and carriers to this new kind of bailment. See *Pullman's Car Co.* v. *Gardner*, 3 Pennypacker, 78, where notice that the company would not be liable for thefts, printed on the berth-check, offered in evidence, was held properly excluded.

LIBEL ON THE DEAD. — In *Regina* v. *Ensor*, Cardiff assizes, February 10, Mr. Justice Stephen held that it was no crime to defame the character of the dead unless the act was done with the intention to injure his surviving family. (*Law Times*, February 19.) The accused had published a defamatory epitaph, which publication caused an assault to be committed by the sons of the deceased. In one count of the indictment it was charged that the act of publication had a tendency to cause a breach of the peace; in another count, that the act was done with an intention to injure the family of the deceased. There being no evidence to support the latter count the court directed a verdict of acquittal. In the opinion it is said, "The dead have no rights and can suffer no wrongs. The living alone can be the subject of protection, and the law of libel is intended to protect them, not against every writing which gives them pain, but against writings holding them up individually to hatred, contempt, or ridicule." Mr. Justice Stephen points out that a publication attacking the living under the mask of attacking the dead might be a libel, and continues as follows: "It is sometimes said, that, as a man must be held to intend the natural consequences of his acts, and as the natural consequence of the censure of a dead man is to exasperate his living friends and relations, and so to cause breaches of the peace, attacks on the dead must be punishable as libels, because they tend to a breach of the peace, whether they are or are not intended as an indirect way of reflecting on the living, unless, indeed, they are privileged as fair comments on matters of public interest or the like. My brother Wills, in charging the grand jury in this case, seemed to take this view. I have the most unfeigned respect for whatever falls from him, but I cannot agree to this in its full extent." If such were the case, Mr. Justice Stephen suggests, all history is more or less unlawful.

It may be remarked that in *Rex* v. *Topham*, 4 T. R. 126, the only authority cited in support of this decision, Lord Kenyon called attention to the fact that the indictment did not state that the publication tended to excite a breach of the peace. The view of Mr. Justice Wills is laid down by Lord Coke in 5 Rep. 125 a. An able criticism of the position taken by Mr. Justice Stephen, concluding in favor of Lord Coke's view, is contained in the *Central Law Journal* of March 18.